LIBRARY
SUPREME COURT, U. S.

FILED
APR 17 1967
JOHN F. DAVIS, CLERK

NO. 1199

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

GEORGE H. GREENE,

Appellant

vs.

THE STATE OF TEXAS,

Appellee

MOTION TO DISMISS OR AFFIRM

CRAWFORD C. MARTIN
Attorney General of Texas
GEORGE M. COWDEN
First Assistant Attorney General
A. J. CARUBBI, JR.
Staff Legal Assistant
R. L. (BOB) LATTIMORE
Assistant Attorney General
HOWARD M. FENDER
Assistant Attorney General
ROBERT E. OWEN
Assistant Attorney General
LONNY F. ZWIENER
Assistant Attorney General
Attorneys for Appellee
Box "R," Capitol Station
Austin, Texas 78711

NO. —

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

GEORGE H. GREENE,

Appellant

vs.

THE STATE OF TEXAS,

Appellee

MOTION TO DISMISS OR AFFIRM

Appellee, The State of Texas, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the above cause be dismissed on the ground that the appeal is not within the jurisdiction of this Court because it is not taken in conformity with the statutes and rules governing appeals to this Court and does not present a substantial federal question, or, in the alternative, Appellee moves that the judgment of the Court below be affirmed.

STATEMENT

This is an appeal from a final judgment of the Texas Court of Criminal Appeals, the highest court in Texas that considers criminal cases and habeas corpus cases arising out of criminal proceedings.

On December 1, 1965, Appellant was stopped for the offense of speeding and issued a summons to appear by the arresting officer. Later, a complaint was filed

by a city employee before a deputy clerk of the Corporation Court of the City of Houston, the complainant using the arresting officer's traffic ticket as a basis for the facts alleged.

Appellant failed to appear pursuant to the summons and a warrant for his arrest was issued based upon the complaint previously filed.

Appellant voluntarily surrendered to the authorities. He then made bond and petitioned for a writ of habeas corpus on the ground that the warrant for his arrest was invalid as not being issued on probable cause. He appealed the denial of the writ of habeas corpus to the Texas Court of Criminal Appeals which Court affirmed the judgment of the lower court. (See Appendix "A" to Appellant's Jurisdictional Statement.) The Court of Criminal Appeals denied Appellant's Motion for Rehearing (Appellant's Jurisdictional Statement, Appendix "B"), and Appellant now attempts to review the proceedings below in this Court by Appeal.

ARGUMENT

While there may be some question as to the validity of the complaint and the subsequent warrant of arrest (because of an inadequate showing of probable cause in the complaint), this question does not form the basis for an Appeal to this Court.

An appeal from the final judgment of a state court is governed by Section 1257, Title 28, United States Code, which statute reads as follows:

> §1257. State courts; appeal; certiorari
>
> "Final judgments or decrees rendered by the highest court of a State in which a decision could

be had, may be reviewed by the Supreme Court as follows:

"(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

There is no question in this case concerning the validity of a treaty or statute of the United States. Nor is there any issue presented here that a statute of the State of Texas is repugnant to the Constitution, treaties or laws of the United States.

Appellant attempts to draw in question the validity of Article 15.05 of the Texas Code of Criminal Procedure which is reproduced in Appendix "C" of the Appellant's Jurisdictional Statement, Appellant suggesting that, since there is no requirement specifically set out requiring probable cause for the filing of a complaint, the statute violates the due process requirement of the Constitution of the United States.

However, it should be observed that probable cause

must be stated in a complaint in order for a warrant of arrest properly to issue. See *Barnes v. Texas,* 380 U.S. 253 (1965). This requirement is recognized by the courts of Texas as is indicated by the commentaries following Article 15.05 in Vernon's Annotated Code of Criminal Procedure. The comments are by W. A. Morrison, a judge of the Texas Court of Criminal Appeals, now and at the time his commentary was written, and John F. Onion, Jr., a state district judge at the time his remarks were written and a judge on the Court of Criminal Appeals since January 1, 1967. The commentaries are as follows:

by Hon. W. A. Morrison:

"It is now the holding of the Supreme Court of the United States and of the Court of Criminal Appeals that a complaint which may be used to secure a warrant of arrest or search must be based on personal knowledge or recite the facts upon which the affiant bases his belief that an offcnse has been or is being committed. Giordenello v. U.S., 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503; Aguilar v. Texas, 84 S.Ct. 1509, 378 U.S. 108, 12 L.Ed. 2d 723; Barnes v. Texas, 380 U.S. 253, 85 S.Ct. 942, 13 L.Ed.2d 808; and Barnes v. State, 390 S.W. 2d 266. See Arts. 18.01 to 18.09."

by Hon. John F. Onion, Jr.

"This article dealing with the requisites of the affidavit or complaint for a warrant of arrest has not been changed, but should be read in the light of Barnes v. Texas, 390 S.W.2d 266, which case was reversed by the United States Supreme Court, 85 S.Ct., 942, 380 U.S. 253, 13 L.Ed.2d 818, in light of Aguilar v. Texas, 84 S.Ct. 1509, 378 U.S. 108, 12 L.Ed.2d 723; and Giordenello v. United States, 78 S.Ct. 1245, 357 U.S. 480, 2 L.Ed.2d 1503. It

would appear from the Barnes decision that the complaint must set forth a sufficient basis upon which an independent finding of probable cause can be made by the magistrate before the issuance of an arrest warrant. . . ."

It seems clear that Article 15.05 as interpreted subsequent to *Barnes v. Texas,* supra, requires a showing of probable cause, as measured by federal standards, in any complaint upon which a warrant of arrest is issued. Accordingly, the statute is not repugnant to the United States Constitution.

As indicated above, the sole question here is whether the particular warrant under which Appellant was arrested was issued upon probable cause. This issue does not present a proper subject for review by this Court by an Appeal from a state court.

It is respectfully submitted that the Appellant presents no substantial question for review by this Court and that this Appeal should be dismissed or the judgment below should be affirmed.

Respectfully submitted,

CRAWFORD C. MARTIN
Attorney General of Texas

GEORGE M. COWDEN
First Assistant Attorney General

A. J. CARUBBI, JR.
Staff Legal Assistant

R. L. (BOB) LATTIMORE
Assistant Attorney General

HOWARD M. FENDER
Assistant Attorney General

ROBERT E. OWEN
Assistant Attorney General

LONNY F. ZWIENER
Assistant Attorney General
Attorneys for Appellee
Box "R," Capitol Station
Austin, Texas 78711

CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General of the State of Texas, one of the Attorneys for Appellee, do hereby certify that a copy of the foregoing Motion to Dismiss or Affirm has been served upon Mr. W. C. Wiebusch, Attorney for Appellant, by depositing same in the United States Mail, Certified, Postage Prepaid, addressed to Mr. Wiebusch at 409 Scanlan Building, 405 Main Street, Houston, Texas, this the 14th day of April, 1967.

LONNY F. ZWIENER
Assistant Attorney General

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

GREENE *v.* TEXAS.

APPEAL FROM THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 1199. Decided May 22, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.